APPENDIX

SUPREME COURT OF THE UNITED STATES

No. Term, 194

JACKSON & PERKINS COMPANY,
Petitioner

vs.

MUSHROOM TRANSPORTATION COMPANY, INC., WILLIAM BICKLEY, trading as BICKLEY'S AUTO EXPRESS,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. THE OPINIONS OF THE COURTS BELOW

The Opinion of the Court of Common Pleas No. 5 of the County of Philadelphia, Pennsylvania (R. 332a) was rendered under date of April 18, 1944.

The Opinion of the Supreme Court of Pennsylvania (R.) was rendered on March 19, 1945, and is recorded in 351 Pa. 583.

A Petition for Re-hearing was filed with the Supreme Court of Pennsylvania on March 26, 1945, but was refused on April 9, 1945.

II. JURISDICTION

1. The date of the judgment entered here by the Supreme Court of Pennsylvania affirming the judgment of the Court of Common Pleas No. 5 of Philadelphia County, Pennsylvania, is March 19, 1945. The date of the refusal of the Supreme Court of Pennsylvania to grant a re-hearing of the case is April 9, 1945. This is a final judgment on the merits by the highest appellate Court of the State of Pennsylvania and leaves the Petitioner with no further redress except by way of certiorari issuing out of this Honorable Court.

2. This suit was predicated upon the law relating to interstate commerce carriers as modified by the acts of Congress known as the Carmack Amendment [Act of June 29, 1906, c. 3591, 34 Stat. 593, 49 U.S.C.A. Section 20(11) note]; the Newton Amendment [Act of March 4, 1927, c. 510, 44 Stat. 1448, 49 U.S.C.A. Section 20(11)]; and the Federal Motor Carriers Act [Act of August 9, 1935, c. 438, 47 Stat. 563, amended by Act of May 16, 1942, c. 318, section 3, 56 Stat. 300; amended by Act of August 7, 1942, c. 552, section 1, 56 Stat. 746, 49 U.S.C.A. Section 319], and is within the jurisdiction of the United States and of this Honorable Court.

3. The jurisdiction of this Honorable Court is invoked under Section 237 of the Judicial Code as amended by the Act of February 13, 1925, U. S. Code Title 28, Section 344, and under Article 3, Section 2 of the Constitution of the United States.

The jurisdiction to review is well settled:

Garrett v. Moore-McCormack Co., 317 U. S. 239 (1942), reversing 344 Pa. 69;

Western Atlantic R. R. Co. v. Hughes, 278 U. S. 496.

III. STATEMENT OF THE CASE

1. When a shipper delivers dormant rosebushes in good condition to interstate motor common carriers and the bushes upon arrival are frozen and valueless, are the carriers liable under Federal law if they fail to prove the existence of low temperatures as the sole cause of freezing and merely assert that they used due care and that the shipper assumed the risk of freezing?

2. Is a motor carrier which carries the shipment the greater part of the way and which is designated as the delivering carrier deemed to be the delivering carrier under Federal Statutes when it carries the shipment to a point to which it may lawfully transport the goods, and then reships the goods with another carrier to a point to which the carrier is not permitted to carry goods?

IV. SPECIFICATIONS OF ERROR

The Supreme Court of Pennsylvania erred in the following respects:

1. The Supreme Court of Pennsylvania refused to apply the Federal rule relating to the burden of proof which a common carrier must present to avoid liability for damage to goods while in transit.

2. The Supreme Court of Pennsylvania erred in following the rule that the common carrier need only offer evidence denying that it was negligent.

3. The Supreme Court of Pennsylvania erred in denying recovery to the Petitioner on the ground that the damage was caused by an inherent vice or defect of the goods when there was no evidence that damage was due to an inherent quality or characteristic.

4. The Supreme Court of Pennsylvania erred in affirming the action of the Court below because the uncontradicted evidence, accepted by the Trial Judge as true, was that the dormant rose plants were shipped at the customary time for the trade, and packed in the customary trade manner so as to withstand zero temperatures provided they were not exposed by the carrier, and the carrier offered no proof as to cause of damage except that they asserted that they were not negligent and the only evidence as to temperatures was that the temperature was above that which was required to freeze the shipment unless it was exposed by the carrier.

5. The Supreme Court of Pennsylvania created an additional ground for exoneration of interstate commerce carriers by permitting the Respondents to raise the defense that the Petitioner had assumed the risk of freezing.

6. The Supreme Court of Pennsylvania failed to determine which carrier was the delivering carrier.

V. SUMMARY OF ARGUMENT

The Petitioner makes the following contentions:

1. The Federal law controls as the goods shipped by the Petitioner were shipped in interstate commerce by common carrier.

2. The Federal law holds that the common carrier is liable for damage to goods while in transit unless the common carrier shows that the damage was caused by an excepted peril, and that it did not contribute thereto in any way by its own conduct.

3. This Federal rule applies even though the goods were susceptible of being frozen.

4. Goods which are susceptible of being frozen are not regarded as subject to an inherent vice or defect, such as will free the carrier from liability when the goods freeze, unless it affirmatively establishes that the freezing was due to temperature conditions alone.

5. A carrier cannot exculpate itself from liability for freezing of goods in transit unless it affirmatively establishes that the temperatures dropped sufficiently low for a sufficient period of time as to cause freezing, and that it did not contribute in any way to their being exposed to such temperatures.

6. In the instant case the only evidence, which was accepted as true by the Trial Judge, was that the dormant rose plants were so packed that they would not freeze unless exposed to zero temperatures for several hours or more, whereas the only evidence relating to temperature was that the lowest temperature on any of the days during transit was 11° Fahrenheit. It was therefore error to conclude that the shipment had not been exposed, since only if it had been exposed could it have been frozen.

7. The Respondents did not establish that the freezing was due to an excepted peril, but left this to conjecture and merely denied that they had been negligent.

8. The evidence established that the Petitioner had not assumed any risk because it did not subject itself to any foreseeable risk when it shipped dormant rose plants during the customary shipping season and packed them according to the trade custom in such a manner as to withstand the reasonable foreseeable temperatures, provided that the packages were not exposed by the carriers.

9. The Respondent Mushroom Transportation Company is the delivering carrier.

VI. ARGUMENT

First Point

THE FEDERAL LAW OF BURDEN OF PROOF CONTROLS

As the goods for whose damage this action is brought were shipped in interstate commerce, the rights and liabilities of the parties are determined by the Federal statutes, the contract of carriage, and the principles of common law enforced in the Federal Courts: *Chicago & N. W. R. Co. v. C. C. Whitnack Produce Co.*, 528 U.S. 369 (1922); *Chesapeake & Ohio Ry. v. Martin*, 283 U.S. 209 (1931).

The Federal Motor Carriers Act of 1935 provides inter alia that "The provisions of . . . (The Carmack Amendment, as modified by the Newton Amendment) . . . shall apply with respect to common carriers by motor vehicle with like force and effect as in the case of (common carriers by rail). . . ." Act of August 9, 1935, c. 438, 47 Stat. 563, amended by Act of May 16, 1942, c. 318, section 3, 56 Stat. 300; amended by Act of August 7, 1942, c. 552, section 1, 56 Stat. 746, 49 U.S.C.A. Section 319.

The delivering carrier, under the Carmack Amendment as modified by the Newton Amendment, is made liable to any holder of a bill of lading for any loss, damage or delay to property caused by it or any preceding carrier to whom the property was delivered: Act of June 29, 1906, c. 3591, 34 Stat. 593, as amended by the Act of March 4, 1927, c. 510, section 3, 44 Stat. 1448; 49 U.S.C.A. Section 20(11). The liability of a carrier is not that of a bailee for its own negligence only, but covers all loss or damage for which the carrier would be liable at common law: *Adams Express Co. v. Croninger*, 226 U.S. 491; *Missouri K. & T. R. Co. v. Harrison*, 227 U.S. 657; *Cincinnati etc. R. Co. v. Rankin*, 241 U. S. 319; *Chicago & E. I. R. Co. v. Collins Produce Co.*, 249 U.S. 186.

> "The statutory provisions manifest the intent of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the diverse requirements of state legislation and decisions. . . . And the question as to the responsibility under the bill of lading is none the less a Federal one because it must be resolved by the application of general principles of the common law." *Southern Rwy. Co. v. Prescott*, 240 U.S. 632, 639-40 (1916).

"The question of burden of proof is a matter of substance and not subject to control by the laws of the several states": *New Orleans and Northeastern Railroad Company v. Harris*, 247 U. S. 367, at 372 (1918); *Southern Rwy. v. Prescott*, 240 U. S. 632; *Central Vermont Railroad Co. v. White*, 238 U. S. 507 (1915); *Garrett v. Moore-McCormack Co.*, 317 U. S. 239 (1942), reversing 344 Pa. 69 (1941).

The Garrett case makes it clear that the result of litigation should not depend upon the accident of the character of the Court in which suit is brought but that the rights should remain fixed by the law which gave rise to the rights and liabilities of the parties. If, as in the case now before this Court, the cause of action is based upon Federal law, the petitioner's rights, including the rule governing burden of proof, must under the Federal Constitution be determined by Federal law.

The state court must follow the Federal burden of proof rule and must accept that rule as it is defined and applied by the Federal Courts. Any modification or any redefinition of the Federal burden of proof rule by a state court violates the petitioner's rights under the Federal Constitution and is reversible error: *Garrett v. Moore-McCormack Co.*, 317 U. S. 239 (1942).

It is therefore concluded that Federal law controls the decision of this case as to the substantive liabilities of the respondents, as to the burden of proof which they must meet in order to establish a defense and as to the quantum of proof they must present for this purpose.

Second Point

Carrier Must Prove Loss Caused by Excepted Peril

Under the Carmack Amendment and the Federal law, when the holder of a bill of lading proves loss or damage to the goods, the presumption arises that such loss or damage has been caused by the negligence of the carrier or its agent: *Galveston H. & S. A. R. Co. v. Wallace*, 223 U.S. 481.

Under the Carmack Amendment, a carrier is liable for failure to deliver goods safely except where the loss results solely from (1) an Act of God; (2) an act of the public enemy; (3) an act of public authority; (4) an act of the shipper; or (5) the inherent nature of the goods. Unless the loss be due solely to these excepted causes the carrier is liable and cannot excuse itself by showing inevitability of the loss, the carrier's freedom of negligence, or that it exercised the utmost possible human diligence and foresight: *Michigan Central Ry. Co. v. Owen & Co.*, 256 U.S. 427; *Commercial Molasses Co. v. N. Y. Tank Barge Corp.*, 314 U.S. 104. Even where there is evidence that the damage to perishable goods was caused in part from natural causes, the burden is on the vessel to show not only that it was not negligent, but to show to what extent the harm was due to natural causes. If the vessel is unable to show what portion of the harm can be attributed to natural causes, the shipper is entitled to recover for the full damage: *Schnell v. The Vallescura*, 293 U.S. 296 (1934).

The burden placed upon the carrier under the Federal law, which controls the instant case, is the burden of affirmatively proving that the damage was caused by an excepted peril and is not satisfied by merely showing that there was a possibility of the excepted peril's being the proximate cause of the shipper's harm.

The freezing of goods is not an excepted cause. See *Chicago & N. W. R. Co. v. C. C. Whitnack Produce Co.*, 258 U.S. 269 (1922), in which apples shipped by rail in interstate commerce were frozen. The distinction must be made, as was done in the case of *Schnell v. The Vallescura*, 293

U.S. 296 (1934), of the difference between a cause and an effect. Just as deterioration was there held to be an effect and not a cause, freezing is an effect and not a cause.

The rationale of the rule placing the burden of proof upon the carrier is that as between shipper and carrier, the means of proving the cause of the loss lies within the control of the carrier. *Schnell v. The Vallescura*, 293 U.S. 296 (1934); *Chicago and Eastern Railroad Co. v. Collins Co.*, 249 U.S. 186, 192-3 (1919); *Bank of Kentucky v. Adams Express Co.*, 93 U.S. 174, 184; *Chicago & Eastern Illinois R. Co. v. Collins Produce Co.*, 249 U.S. 186, 192, 193; *Railroad Co. v. Lockwood*, 17 Wall. 357, 379, 380.

Possessing the superior means of establishing the cause of the shipper's damage, the carrier is bound to affirmatively prove that cause, and it is not sufficient for him to state that he used due care and on this testimony base the conjecture that the harm was necessarily due to an excepted peril. Freezing is not a cause but an effect. Consequently, the carrier does not sustain its burden of proof where goods shipped have frozen by mere proof of the freezing. The carrier cannot excuse itself by showing that it exercised diligence. It must affirmatively establish that the freezing was due to an excepted peril.

Third Point

Character of Goods Immaterial

Under the Federal rule, no change is made to the burden of proof of the basis of the goods shipped being "perishable" or "non-perishable".

In *Chicago etc. Railway Co. v. Whitnack Produce Co.*, 258 U.S. 369, an action was brought by a shipper against a common carrier by rail for damage resulting from the freezing of two carloads of apples. That case makes no distinction with regard to the burden of proof by reason of the goods being "perishable" or "non-perishable". It restates the doctrine previously applied by the Supreme Court of the

United States in the case of "non-perishable" goods and bases the rule as to burden of proof, not upon the nature of the shipment but upon availability of proof.

This rule of requiring the defendant to specifically show that harm was caused by an excepted peril rather than permitting him to avoid liability by stating that he was careful and by claiming the goods were perishable has been followed by the Federal Courts in many decisions in the carriage by sea of such goods as fruit, onions, macaroni, butterine, apples, sugar, flour, tobacco, and coffee: *Schnell v. The Vallescura*, 293 U.S. 296 (1934); *American Fed. Cas. No. 1*, 283 (D.C., N.Y. 1877); *Alliance Tobacco Co. v. U. S.*, 12 F. S. (D.C., N.Y. 1936), affirmed C.C.A. (2d) 85 F. (2d) 86; *Serio v. The Giava*, 56 F. 243 (D.C. La. 1893); *Western Mfg. Co. v. The Guiding Star*, 37 F. 641 (C.C. Ohio 1889); *Western Transportation Co. v. Downes*, 78 U.S. 129; *Callister v. U. S. Shipping Board Merchant Fleet Corp.*, 21 F. (2d) 447, *affirmed*, 30 F. (2d) 1008; *Argo S. S. Co. v. Seago*, 101 F. 999 (C.C.A. La. 1900); *Warner Barnes & Co. v. Kokosai Kisen Kabushiki Kaiska*, 102 F. (2d) 530, *modified*, 103 F. (2d) 430 (C.C.A. 2, 1939); *Check Neal Coffee Co. v. Osaka Shosen Kaiska*, 36 F. (2d) 256, D.C. La. 1930, *affirmed* 39 Fed. (2d) 1021 (C.C.A. 1930); *Sparks Milling Co. v. U. S.*, 5 F. (2d) 567 (D.C. La. 1934).

No distinction can be made between carriage by sea, rail or motor carrier. The principles on which the carriage by sea cases are based are derived from common-law principles. *Schnell v. The Vallescura* 293 U.S. 296 (1934); *Chicago & N. W. R. Co. v. C. C. Whitnack Produce Co.*, 258 U.S. 369 (1922).

Inasmuch as the reason for the rule requiring the carrier to affirmatively show that the shipper's loss is due to an excepted peril is based upon unavailability of proof to the shipper and availability of proof to the carrier, any distinction based upon the type of carrier or the nature of the goods would ignore the very basis of the rule.

It is therefore concluded that under the Federal law, which must control all shipments in interstate commerce, the

carrier cannot exculpate itself unless it affirmatively shows that the damage was caused by an excepted peril and that it is immaterial whether the goods were "perishable" or "non-perishable" or whether the carrier transports by vessel, rail or motor vehicle. In every case, he must carry the burden of affirmatively establishing his defense because the means of establishing this defense are available to him.

The Court below asserted that because the goods were perishable, the burden was on the shipper. If this were so, there would be no need for having an excepted cause "inherent nature of the goods" within which the carrier might bring itself and thus escape liability, inasmuch as a prima facie case would not be made out where the goods were in fact perishable. Consequently, the very fact that the inherent nature of the goods is an excepted cause is itself proof that regardless of the nature of the goods, the burden is upon the carrier once shipment in good condition and delivery in good condition is shown by Plaintiff.

Fourth Point

The Respondents Did Not Sustain the Burden of Proof

The burden of proof that the freezing of the petitioner's shipment was due to an excepted cause was not met by the respondents. They merely offered testimony that they had been careful.

The Trial Court below found as a fact that the dormant rosebushes were shipped in good condition, properly packed and packaged, and arrived in a frozen and valueless condition (R. pp. 312a-314a). The burden was then upon the carrier to prove that the sole cause of loss was an excepted peril.

Instead of meeting this burden of proof that the harm was due to an excepted cause, the respondents denied that

the goods were frozen (R. pp. 140a-141a) and went to great lengths to establish by cross-examination of the petitioner's witnesses that the rosebushes had not in fact been frozen.

The evidence established that the rosebushes when shipped were packed with moss around the roots and with excelsior around the buds or tops of the plants (R. pp. 63a, 84a, 135a, 136a, 162a). The rosebushes were dormant at the time of shipment (R. pp. 55a, 78a). They were packed in thirty-two boxes, being of solid wood approximately twenty inches by twenty-two inches by forty-four inches (R. pp. 66a, 81a, 114a, 162a). Around the bushes, the moss and the excelsior, there was wrapped a layer of thick brown insulating paper (R. pp. 84a-85a, 114a), and each box was itself wrapped in two layers of insulating paper (R. pp. 84a, 85a, 163a, 257a). The evidence also established that this was the customary and usual manner in which dormant budded rosebushes were shipped (R. pp. 63a, 76a, 135a-136a, 153a, 159a, 160a, 161a), and that the usual season for shipping such rosebushes is from January through March (R. pp. 109a, 135a).

Petitioner called three experts in the culture and care and shipment of roses as witnesses on its behalf. One of these was Jacob Finewood, who had been employed by petitioner as the head of its shipping and packing for thirty years, and had been familiar by reason of his experience during those thirty years with the cultivation and care of rosebushes generally and their protection from freezing. In addition, petitioner also called as witnesses the general manager and the chief rose grower of Florex Gardens, the consignee. The consignee, it should be emphasized, was not a party to the action, but was an independent third person without any interest in the controversy. Both of these witnesses had had experience for over twenty years in the culture, growing and care of roses, as well as protection of roses from freezing.

It was the unanimous opinion on the part of these experts that the freezing in question was thorough and severe

and could not have resulted other than from the direct exposure of the cases to the elements for a considerable period such as five, six, or seven consecutive hours (R. pp. 276a, 278a-284a) and that the dormant rosebushes were packed in such a manner that they would withstand temperatures of zero degrees unless exposed for some time (R. pp. 77a-78a, 163a, 169a-170a). The respondents made no attempt to contradict the testimony of these witnesses.

Respondent Bickley, in the presentation of its case, called witnesses who testified that at the time of the delivery of the first part of the shipment by Mushroom to Bickley at Mushroom's loading platform, at or about 4 p.m. on Tuesday, January 6, 1942, a skim of frost or ice was noticed upon the "tall" side of the cases. By this the witness obviously meant that side of each case having the largest area. It was further testified that the paper was "stuck" to the wooden box by the skim of ice and frost (R. pp. 181a, 188a, 195a).

Bickley, upon receiving the first part of the shipment at 4 p.m., drove the shipment a few blocks to their loading platform, from whence it was carried immediately, without being unloaded from the truck, to its garage in Jenkintown. There the cases were allowed to remain in the truck, which was parked in Bickley's garage, and the shipment was then delivered to the consignee early the next morning. The garage was not heated (R. pp. 183a, 187a).

Approximately an hour or so after delivery of the first part of the shipment to the consignee, Bickley received a call from the Philadelphia general manager of Mushroom, who stated that he was at North Wales, and inquired if the second shipment had been received by Bickley from Mushroom. He was told that it had not, and he requested Bickley to use their utmost expedition to see that the second part of the shipment was quickly delivered (R. pp. 189a, 193a). He did not tell Bickley at this time that the shipment was

frozen, though he then knew that the first part of the shipment had been received in a frozen condition (R. pp. 115a-117a, 268a, 274a).

The second part of the shipment was received in Philadelphia by Mushroom at or about 2 p.m. on Wednesday, January 7, 1942. It was called for by Bickley about 3 p.m. and taken to Jenkintown, kept in the truck in the garage overnight, and then delivered to the consignee (R. pp. 190a-191a, 201a, 208a). An employee of the consignee testified that the second shipment was delivered by Bickley in an *open-back* truck (R. p. 147a). The second shipment likewise was frozen (R. pp. 118a, 125a, 147a, 157a, 158a, 162a).

The reason given by Mushroom for failure to deliver the entire shipment on the sixth, in accordance with its regular practice of overnight service, was that it had only one truck ready to leave Rochester on Monday, January 5, and that there was not enough space left in it to carry the entire shipment (R. pp. 238a-241a). The second part of the shipment was therefore held over until the evening of Tuesday the sixth. The reason given by Bickley for its failure to make immediate delivery to the consignee was that its men belonged to the union and could not work more than a certain number of hours, in consequence of which it stored each part of the shipment overnight in its garage (R. pp. 183a-184a, 186a-187a, 190a-191a, 200a-201a).

On the following Monday, January 12, the witness Finewood, was sent by Petitioner to North Wales. He inspected both shipments, and took a sampling from each case, and assured himself that the bushes were frozen. During part of this inspection, a representative of the respondents was present (R. pp. 71a, 74a, 86a, 93a, 118a, 140a, 271a).

The consignee itself, before determining whether to accept or refuse the shipment had made a very thorough examination of each case, which necessitated the service of six men for the equivalent of a nine-hour day. This exami-

nation consisted of a careful inspection of the root tendrils of the plants to determine whether or not the tubular cell structure was decaying, and whether that decay had reached the crown (R. pp. 137a-138a, 152a, 158a-159a).

The witnesses Finewood, Lukens and Culp were in substantial accord as to the exact percentage of the rosebushes that were totally dead. All agreed that at least eighty-five percent of the shipment was totally devitalized, and could not grow (R. pp. 76a, 100a, 127a, 152a, 164a, 167a, 281a). As to the remaining plants, they were in substantial agreement that (1) a large portion of them would not live; (2) that the only way in which it could be determined what proportion of them would live would be either (a) by a detailed microscopic examination or (b) by actually planting the entire shipment (R. pp. 76a, 91a, 97a-98a, 100a, 127a, 142a-143a, 154a, 158a, 164a-165a).

The respondents in their cases, as defendants in such cases usually do, offered alleged proof that each was scrupulously careful and neglected no precaution necessary to protect the shipment.

The testimony of Bickley's showed that when the first shipment of plants arrived at their Callowhill Street platform in the late afternoon of January 6, 1942, the boxes "had paper on them, and some of the paper was like torn and the cases, they had like a slight skim of ice and frost on the bottom of them" (R. p. 181a). The box was "stuck to the paper, a slight skim of ice and frost, like, on the bottom of the cases." The bottom of the cases faced the witness as he looked at them (R. pp. 188a, 195a). This was the tall end (R. p. 194a).

The testimony of this witness, which was given on the stand before there was any prior testimony as to the position of the boxes, is in accord with that given by the witness called by Mushroom Transportation Company. This witness testified that the first boxes were loaded upon the Mushroom Company truck facing the back (R. p. 239a). It is also significant that the manager of the Philadelphia office of Mushroom Transportation Company testified that

he was called to the Florex Gardens early on the morning of January 7, and inspected the first shipment. He then immediately called Bickley's. Bickley's testified, and it was not denied by Mr. Patterson, that at the time of the phone call Patterson did not tell Bickley's that the first shipment had been frozen. The call was merely an inquiry "if his office had called me (Bickley) about another shipment of flowers coming into Florex Gardens, and I said, 'No they haven't called me as yet.' He said, 'There is another shipment coming through' and can I try to rush it there as quick as possible? I said that we cannot make same day shipment, and he said 'Do the best you can.'" (R. pp. 115a-117a, 189a, 193a, 268a, 274a).

Had Bickley's any intimation that the first shipment had been frozen, they would have, of course, at the time of the second shipment, inspected it carefully. The failure to inform of the fact that the first shipment had been frozen points towards a desire on the part of Mushroom not to have Bickley's inspect the second shipment closely.

Bickley's however, was not free from fault. The testimony of the consignee was that the bushes were delivered in a truck, the back door of which was not wooden. It was apparently a slatted gate, with a tarpaulin. Needless to say, such a rear door would not provide as ample protection for the rosebushes as would a solid wooden rear door. Bickley did not deliver the two shipments of rosebushes on the same day they were received but held each part overnight in its garage at Jenkintown, the shipments remaining in the truck. Nor was the garage heated in which the rosebushes were kept overnight by Bickley (R. pp. 182a, 187a, 201a). Furthermore, the back door of Bickley's truck was kept open on at least the second shipment, thereby improperly exposing the rosebushes, for an employee of the consignee gave the uncontradicted testimony that the back of the truck in which it was delivered by Bickley was open (R. p. 147a).

On the other hand, Mushroom had possession of the first part of the shipment from early Monday morning until late Tuesday afternoon. It had possession of the second part of the shipment from early Monday morning till late Wednesday afternoon. The direct exposure to the elements, disclosed by the evidence, may well have been suffered while the bushes were in Mushroom's possession, since it had possession of the bushes for approximately eighty percent of the time taken in transit between Newark and North Wales and for approximately ninety-five percent of the distance between those points.

In addition to this evidence, there is the testimony of the impartial witnesses called by petitioner—the general manager and the chief rose grower of Florex Gardens. This is one of the largest greenhouses in the world, with approximately two and a half million square feet under glass. The testimony of petitioner's witnesses was absolutely clear on the point that the frozen condition of the bushes upon arrival was so severe that it could have been caused only by direct exposure for a considerable period (R. pp. 77a-78a), 163a, 169a-170a, 276a, 278a-284a). Under the testimony presented on behalf of both respondents, there was no indication of direct exposure to the elements for any period. The conclusion is inescapable that the witnesses called for either one or both of defendants were not telling the truth, or at least were not telling the whole truth. At some time in transit, the bushes must have been exposed without shelter to the action of the elements for a period of five, six or seven consecutive hours (R. pp. 276a-278a, 284a).

Clearly in the instant case some carrier was negligent. The rosebushes as packed would withstand a zero temperature for several days, provided they were not exposed directly to the elements for five or more consecutive hours. The carriers were informed of the nature of the shipment, and that it should be protected from extreme cold, and that above all it should not be subjected to undue exposure or

delay at transfer points (Exhibit P-4, at R. p. 17a). Having notice of the perishable character of the goods, respondents cannot claim that they are relieved of the exercise of the degree of care necessary to protect the shipment which notice imposes upon them: See *Bell Telephone Co. v. American Ry. Express Co.*, 92 Pa. Superior Ct. 180 (1927); *Willock v. Pa. R. R. Co.*, 166 Pa. 184.

The condition of the plants conclusively shows that the bushes were, in the words of the witness Kulp, "directly exposed for a considerable period" (R. p. 276a). Each respondent, acting with knowledge of the nature of the shipment and of all the surrounding circumstances, well knew and well had reason to know that its conduct could not but help to result in harm to the shipment. Nor were the protective measures they were required to make in order to preserve the shipment unreasonable. The shipment could easily have been protected at transfer points.

There is no evidence in the record as to the care taken of the bushes in question by Goetzman and Newman, the initial carrier. It is no defense, however, to respondents to assert that Goetzman and Newman were negligent and not they, for under the law, the delivering carrier is liable for the negligence of any preceding carrier. So, if Goetzman and Newman should be presumed to be negligent, and there is no proof to the contrary, one of the respondents as delivering carrier would be liable as delivering carrier and would be entitled to recover over from the preceding negligent carrier under the Carmack Amendment.

The respondents were so concerned at the trial with seeking to establish that the dormant rosebushes were not frozen and in showing that they had been very careful, that they neglected entirely to show what caused the freezing. The uncontradicted testimony accepted as credible by the Trial Judge was that the rosebushes were so packed that they would withstand temperatures as low as zero degree, unless exposed for several hours, and that the condi-

tion of the goods was such that they must have been exposed for a considerable period. The only evidence regarding temperatures established the existence of an average temperature of fifteen degrees above zero at the point of shipment, and temperatures of fifteen, eighteen, and eleven degrees above zero, respectively, at Philadelphia on the three days relevant to the shipment.

Under the circumstances, the alternatives were then presented whether the goods froze because (1) they were exposed by the respondents, or (2) the temperatures dropped so low that the rosebushes froze although not exposed, or because (3) of a combination of (1) and (2).

Neither party presented evidence establishing which alternative was the cause of the effect of freezing. Under the Federal law, which controls the instant case, the carriers, the respondents, have the burden to sustain that there existed temperatures so low that the goods froze even though not exposed. As the record now stands, the respondents are in the position of saying to the Court that they were very careful and therefore the goods must have frozen because of low temperatures. This is not proof. This is merely conjecture, and nothing is more firmly established than that a carrier cannot be excused from liability by conjecturing that the shipper's goods might have been damaged by an excepted peril. The carrier must prove this affirmatively.

Even where the carrier has proven that the loss is due to an excepted cause, it must also show that the loss occurred solely as a result of the excepted cause and not in any part as the result of the carrier's negligence: *Washington and G. R. Co. v. Varnell*, 98 U.S. 479; *Chic. & E. I. R. Co. v. Collins Produce Co.*, 249 U.S. 186, *aff'g*, 235 F. 857. The Pennsylvania law is in accord: *Cunningham v. Penna. R. R. Co.*, 40 Pa. Superior Ct. 213 (1909).

Conjecture as to proximate cause is condemned throughout the law. The mere possibility that an excepted

factor could have been the cause of harm is not a sufficient defense: *Schnell v. The Vallescura*, 293 U.S. 296 (1934).

The Court below declared that the petitioner "voluntarily and as part of its case advanced a specific theory to account for the freezing or destruction of the rose trees by combination of weather conditions involving long exposure to high winds at low temperatures and to sunshine" (R. pp. 334a, 335a). This statement is not correct. It is true that the statement of claim alleged negligence upon the part of the respondents in that "The said defendants [respondents], well knowing and having reason to know that the said goods were perishable, and contrary to the instructions given to them, and stated on the labels on the packages in which said goods were shipped, to deliver without unreasonable delay and to properly protect the shipment from freezing, neglected so to do, and persisted in so doing contrary to their respective undertakings" (R. p. 7a).

The fact that the petitioner has advanced a theory or hypothesis for the damage to the goods does not alter the fact that the petitioner lacks the means of proving the cause of the damage for the reason that such means are in the possession of the respondents. It cannot and does not alter the burden of proof which the respondents must meet under the Federal law. The opinion of the Trial Judge likewise cites a few cases from other States to the effect that where a shipper avers a particular act of negligence on the part of the carrier, the shipper cannot recover if he fails to prove that particular act. This in substance means that a plaintiff who pleads more than he is required in order to establish his case is denied relief if he fails to prove everything he pleads even though he does present sufficient proof to establish his case. Such reverence for the pleaded averments is not paid by Pennsylvania Courts, and there is no reason why the strictness of the old common-law pleadings should be revived for the decision of this case.

More controlling, however, than any other consideration is the fact that the rights of the petitioner are to be de-

termined by the Federal law. Under that law, there is no authority for the contention of the respondents just discussed. Under that law, the respondents, irrespective of the offers of proof by the petitioner or the averments of the petitioner's pleadings, must meet at the trial the burden of affirmatively establishing that the petitioner's damage was caused by an excepted peril to which the respondents did not contribute in any way.

The Court below declares, "the susceptibility to cold is merely an inherent vice of a different nature" (R. p. 322a). This is directly contrary to the *Vallescura* case wherein it was held that deterioration is an *effect*, not a *cause*, and that the carrier to bring itself within the exception must show the damage was produced by an excepted cause. That the weather which prevailed was not an excepted cause was conceded by the Trial Judge whose adjudication states that "freezing weather coming at a season or a time when such weather may be expected, is not an act of God" (R. p. 314a).

That the liability of the respondents was likewise misunderstood is seen from the statement of the Trial Judge who quoted the Carmack amendment and then declared "It will be seen that Congress by this Act has . . . imposed liability only for loss caused by . . . carriers to whom the property may have been delivered for carriage where such loss is attributable to a breach of duty or a default on the part of a carrier" (R. p. 315a). The Trial Judge regarded this as being the equivalent of negligence despite the fact that he declares that "The Federal Rule is that 'A carrier is liable for a failure to transport safely goods entrusted to its care unless the loss or damage was due to one of the specified causes' ": *Chesapeake & Ohio Ry. Co. v. Thompson Mfg. Co.*, 270 U.S. 416, 422 (R. pp. 314a-315a). The word "specified", when read in connection with the context of the case, clearly discloses the Supreme Court was referring to the five excepted causes of loss.

The Court below permitted the respondents to exculpate themselves by merely asserting that they were careful. By thus permitting them to defend by suggesting the possibility that there may have been such low temperatures as to have caused the freezing in spite of the way the dormant rosebushes were packed, the Court below in effect placed upon the petitioner the burden of disproving the existence of such temperatures. In substance, the lower Court placed upon the petitioner the burden of proving that the temperature at all times remained so high that it would be impossible for the rosebushes to have frozen unless they were exposed, and in the absence of proof of such high temperatures, concluded that it could be conjectured that the temperatures may have dropped so low that the bushes froze even though not exposed. Official Weather Bureaus are maintained by the United States Government at only two points along the route of shipment of the rosebushes—one at the initial point of Rochester, and the other in Philadelphia, near the ultimate delivery point of the goods. There is no means by which the petitioner could have obtained evidence of the temperatures along the route of shipment from any official source. Nor is there any means by which a shipper in the petitioner's position could anticipate a need for evidence on temperature and protect itself by reasonable action on its part.

Under the decision of the Court below, a shipper would be put to the ridiculous extreme of either accompanying the carrier, which would be prohibited by the Interstate Commerce Commission as freight carriers cannot carry passengers, or the equally ridiculous alternative of having the shipper escort the carrier in a separate vehicle. In contrast with this, the carrier can have a thermometer placed in the van of its trucks and have the driver make periodic readings. These readings would not, of course, have the same sanctity as official weather records by an impartial government department. Nevertheless, having been made

before any litigation arose, and being filed with the carrier's home office within a reasonable time after the trucks completed their runs, they would be admissible as evidence. *As between shipper and carrier, there can be no question but that the means of obtaining temperature readings along the route while the goods are in transit lies within the power of the carrier alone.* On the basis of comparative availability of such evidence, the burden of proving temperature when it is asserted as a defense should be upon the carrier.

Considerations of the administration of justice cannot pass unheeded in determining the question of burden of proof. If the carrier does not have the burden of proving abnormal temperatures, then it can exculpate itself by such loose testimony as that presented in the instant case that the respondents had used due care.

In the instant case, the truck driver for Mushroom testified that the goods had always been kept protected from exposure. With remarkable accuracy he was able to recall months later that one shipment of rosebushes had been kept free from exposure at all times. Further cross-examination showed that he had no specific recollection of other shipments, but that he recalled this specific shipment. Is it not at least remarkable, if not incredible, that the driver should, as if struck by some clairvoyant premonition, make such a mental note of this one shipment out of this one truckload out of many truckloads, and be able to recall and to state under oath that it had not been exposed? A rule of evidence which permits such proof as this to exculpate a defendant opens the way to fraud, for in the great majority of cases, barring the occurrence of some accident en route which would make the event stand out in the truck driver's memory, a truck driver or carrier would have no specific recollection of a particular shipment, and at most could only state that the goods were not exposed because they were in the habit of exercising due care. Such testimony might be truthful but would be far from proving the specific point

that the goods were not exposed at the particular time and under the Federal law is inadequate to exculpate the carrier. The only other type of testimony that the carrier could offer was illustrated in the instant case in which the care showered upon one shipment was recalled while all else was forgotten (R. pp. 253a-259a).

It is no objection that in some cases liability will be put upon a carrier when, under the circumstances of the case, it is unable to prove temperature. In such a case where temperature is not established the liability for a loss which may be due to either temperature or the carrier's neglect is placed upon the carrier. This is the Federal rule for "the carrier is charged with the responsibility for a loss which, in fact, may not be due to his fault, merely because the law, in pursuance of a wise policy, casts on him the burden of showing facts relieving him from liability": *Schnell v. The Vallescura*, 293 U. S. 296, 307 (1934).

The Trial Judge concluded that the rose plants were perishable because they were labelled "perishable". It must be recognized, however, that the goods were so labelled only to call to the carrier's attention that negligence on the part of the carrier in exposing the goods to extreme heat or cold would result in the destruction of the goods. It was to serve as a warning for the carrier's benefit and for the protection of the goods, and was not a formal declaration that the petitioner should thereafter be estopped from claiming that the respondents would have the burden of proof that any harm to the goods was due to a natural cause for which they were not legally responsible.

The fact that the shipper exercises care to protect its property does not lessen in any way the duty of the carrier or reduce the burden upon it of proving that damage to the goods was due to the realization of an excepted peril: *Lehigh Valley R. R. Co. v. Russia*, 21 F. (2d) 406, *cert. den.* 275 U.S. 571.

"Perishable" on the labels was merely synonymous with "destructible" or "susceptible to injury", and does not es-

tablish as a fact that the goods are perishable within the meaning of any alleged rule of law changing the burden of proof in the case of perishable goods.

The Trial Judge reasoned that since the rosebushes were "destructible", they were "perishable". This is not the standard for determining whether goods are "perishable" in law. Man has not yet invented that which cannot be destroyed by external forces. An iron anvil will melt and run as water in the white heat of a burning train wreck. Manifestly, the anvil is susceptible of destruction, but certainly no rule of law would say that it was perishable. This illustration is not carrying the point to an absurdity, but merely brings out the distinction which analysis shows exists in the cases between goods which are subject to deterioration or destruction because of an inherent vice or infirmity and goods which are destructible only through the operation of external forces. An analysis of the cases and authorities cited by the Trial Judge reveal that the term "perishable" is only properly applied when the goods by themselves, without any change in external conditions, will by the mere lapse of time deteriorate.

In the instant case, the damage to the goods was caused not by their inherent nature, but by the operation of external elements to which they were subjected. It cannot be contended and has not been contended here that the rosebushes would have frozen in any event by reason of their inherent nature.

It can be said with certainty that it is a natural law that fruits and vegetables will decay, but it certainly cannot be said to be either a natural law or an inherent characteristic of a dormant rosebush that it will freeze: *Louisville and Cincinnati Packet Co. v. Long*, 14 Ohio Circuit Ct. N. S. 225. Particularly is this so where, as here, the only evidence reveals temperatures at which the goods could not have frozen because of the manner in which they were packed unless they were exposed for several hours.

In the *Louisville* case it was held that freezing of a

shipment of apples in transit in the latitude of Southern Ohio in December could not be attributed to an act of God or to any inherent nature of the fruit which could not be guarded against, but was due to the negligence of the carrier.

There is no doubt that at common law, a carrier is liable for its negligence when such negligence is the proximate cause of the freezing: *St. Louis and San Francisco R. R. Co. v. Dreyfus*, 42 Okla. 401 (bananas); *Merchants and Miners Transportation Co. v. L. J. Upton and Co., Inc.*, 127 Va. 406 (potatoes); *Wolf v. American Express Co.*, 43 Mo. 421 (wine); *B. Presley Co. v. Illinois Cent. R. R. Co.*, 117 Minn. 399 (holly); *Johnson v. Missouri and Pacific R. R. Co*,. 211 Mo. App. 564.

The correct rule to be applied in the instant case is that the respondent can only establish a defense by showing that the damage to the goods was due to an excepted cause. This burden is not met merely by statements that the respondents were careful.

As above stated, the rule rests upon the practical consideration that as between the shipper and the carrier, the latter is alone able to establish what occurred, and if he desires to avoid liability for destruction of the goods he must affirmatively prove that the goods were destroyed by reason of an excepted cause.

Fifth Point

Assumption of Risk Is Not a Recognized Exception to a Carrier's Liability

The Court below concluded that the respondents were not liable because the petitioner had assumed the risk of the goods freezing. By this statement the Court below probably intended to state that the loss should be regarded as "due to the act of the shipper". Unless it can be so regarded,

the assumption of risk is not a valid defense to a carrier, for apart from this construction that defense does not exist. See *Michigan Central Ry. Co. v. Owen & Co.*, 256 U. S. 422; *Commercial Molasses Co. v. New York Tank Barge Corp.*, 314 U. S. 104.

The Court below stated that the petitioner could have shipped the rosebushes by heated trucks had it been willing to pay more for their carriage. In the fact that the heated trucks could have been obtained, the Court finds an assumption of the risk of freezing by use of nonheated trucks. The lower Court also states that the petitioner knew that the rosebushes would freeze and that it was common knowledge that rosebushes would freeze and these in fact froze, and therefore the petitioner assumed the risk that they would freeze.

All this, of course, overlooks the uncontradicted testimony accepted as true by the Trial Judge, whose findings of fact were affirmed by the Court below, to the effect that rosebushes packed as the shipment in question were packed and shipped in unheated trucks in the dead of winter would not freeze unless either or both of the following conditions existed: (1) the temperature remained below zero, not merely freezing, a substantial period of time; or (2) the rosebushes were exposed by the carrier.

Admittedly the petitioner assumed the risk of condition (1), but did it either in fact or in law assume the risk of condition (2)?

It is manifest that he did not and there was no evidence that condition (1) occurred. The only evidence on point would not place the temperature at any time material to the action at less than 11 degrees above zero.

The trucks in which the bushes were carried were closed trucks and the carriers were put on notice by the label of the shipment that exposure must be avoided. The petitioner certainly did not assume that a carrier thus put on notice would expose the shipment, and it was under no duty to anticipate negligence on the part of the carriers. The effect of the action of the Court below was to prejudge

the petitioner's case. The Court in effect said to the petitioner that, since it knew the shipment could freeze, it assumed the risk of their freezing when he shipped them by unheated trucks. This bars the petitioner entirely from its day in Court, for it can never establish that it was the respondents' negligence which made it possible for the shipment to freeze if the bare fact that the shipment froze bars him from Court. The effect of the decision is to establish a rule of law that no plaintiff can recover for a frozen shipment when an unheated truck is used. This conclusion was reached by the Court below in spite of the believed testimony which established that shipments packed as these were would not freeze in a closed unheated truck unless the temperature remained below zero, and in spite of the fact that shipment in this manner during the winter was the common practice of the trade.

Did the petitioner assume any risk when it shipped in the dead of winter? It did not as a matter of law: *B. Presley Co. v. Ill. Cent. R. R.*, 117 Minn. 399, nor did it as a question of fact. The uncontradicted testimony was that dormant rosebushes were customarily shipped during the dead of winter for the reason that they would not remain dormant unless kept at a low temperature. The uncontradicted testimony accepted by the Trial Judge is the answer to the reasoning of the lower Court that it is common knowledge that rosebushes freeze and that as the shipment in question froze, the petitioner had assumed the risk that they would freeze. That testimony showed that this judicial notice taken by the Court was erroneous. The testimony established that dormant rosebushes do not freeze when shipped in dead of winter when packed in the manner of the shipment in question unless either condition (1) or (2) above stated occurs. The Court below fell into error in permitting itself to view the dormant rosebushes as ordinary delicate plants which would freeze when the temperature fell to the freezing point.

The only risk which the petitioner assumed was that the goods would freeze solely because of the lowness of the temperature, and that, in the state of the record means a sustained temperature of zero degrees. It did not assume the risk of freezing due primarily or in part to negligent exposure of the shipment by the respondents. The respondents, to exculpate themselves in accordance with the principles of burden of proof above described, must affirmatively show that the loss of the petitioner was due to the realization of the one risk which it had assumed. They cannot avoid liability by stating that they were careful, and that therefore, since they were careful, the petitioner's harm necessarily must have been caused by a risk which it had assumed. If the respondents wish to rely on the defense of assumption of risk, they must affirmatively show injury from low temperature.

Under the testimony in this case, this could only be done by proving that the temperature remained below zero a substantial part of the time while the rosebushes were in transit.

Sixth Point

Mushroom Transportation Company Is the Delivering Carrier

The Carmack Amendment defines the delivering carrier as "the carrier performing the line-haul service nearest to the point of destination, and not a carrier performing merely a switching service at the point of destination. . . ." 49 U. S. C. A. Section 20(11).

In the decision in *Missouri Pacific Railway Co. v. Reynolds Grocery Co.*, 268 U. S. 366, it was held that where the carrier designated in the bill of lading as the delivering carrier employs another carrier to switch a car from its lines to the warehouses of a consignee, the last carrier is not a delivering carrier but is merely the agent of the designated delivering carrier. In the instant case, Mushroom Transportation Company was designated in the bill of lad-

ing as the delivering carrier. It contracted to deliver the goods of the petitioner to North Wales. It had no authority to deliver goods to that point, although it had authority to go to Philadelphia, some twenty miles from North Wales (R. pp. 217a-218a, 234a, 335a). The use of a connecting carrier in the instant case was therefore essential to enable Mushroom Transportation Company to perform its contract of carriage to North Wales.

Mushroom Transportation Company should therefore be held the delivering carrier both because (1) it performed the greater haul and was the designated delivering carrier, and (2) Bickley's Auto Express was in substance the agent of Mushroom Transportation Company to enable it to perform a contract which it had undertaken but which it lacked authority to perform.

VII. CONCLUSION

The Supreme Court of Pennsylvania has rendered a decision upon a Federal question of substance in conflict with the decisions of this Honorable Court. This decision works material injury by destroying the uniformity of the law relating to interstate commerce.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and therefore that a Writ of Certiorari as prayed for should be granted, to the end that the judgment below may be ultimately reversed and that judgment be entered for the Petitioner.

Respectfull submitted,

RONALD A. ANDERSON,
JOHN M. SMITH, JR.,
Counsel for Petitioner.

Date: